SUPREME COURT, U. S.

73-1868

FILED
JUL 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

SALVATORE TERRACIANO,
Petitioner,

vs.

ERNEST MONTANYE, Superintendent of Attica Correctional Facility,

and

CARL F. DRAXLER, Sheriff of Chemung County,
Respondents.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Statement of Facts.

On April 14, 1969, during business hours, Theodore Kowitt, a Senior Narcotics Investigator with the New York State Narcotic Control Bureau went to the pharmacy operated by the defendant and advised the defendant who he was and that he was there to conduct an audit of narcotics, exempted narcotic preparations and depressant and stimulant drugs (R. 108 and 109).[1] After being given the Miranda warnings, the defendant indicated that he understood and that he wished to call his at-

[1]All references herein are made to the Record in this case in the Appellate Division, Third Department, Appendix to this Brief.

torney which he went to do (R. 109). Kowitt asked the defendant if it was all right to begin (R. 125) or if he had any objection (R. 126). Sometime thereafter, an individual appeared, stated that he was the defendant's attorney and after a conversation with Kowitt left the pharmacy (R. 109-111). No objection was raised either by the defendant or his attorney to the examination of the records by Kowitt (R. 110 and 153). Kowitt conducted his examination of the records on April 14 and 15 and in the course of it took into his possession certain records maintained by the defendant consisting of eight (8) narcotic prescriptions (R. 130), 9 depressant and stimulant prescriptions (R. 131) and 17 records pertaining to depressant and stimulant drugs (R. 131). Certain of these records were presented to the Grand Jury which returned a 29 count indictment against the defendant.

On February 17, 1970, a Suppression Hearing was held pursuant to Section 813(c) of the Code of Criminal Procedure to determine whether the records removed from defendant's premises were lawfully seized (R. 107). The decision of the Hon. Donald H. Monroe dated February 24, 1970, denied defendant's motion to suppress certain evidence (R. 217). On February 27, 1970, the District Attorney agreed to permit the defendant to plead to the first and eleventh counts in full satisfaction of the 29 count indictment (R. 79). On October 2, 1970, upon defendant's conviction of the crime of Criminal Possession of a Dangerous Drug in the Second Degree in violation of Section 220.15, subdivision 1, of the Penal Law of the State of New York, the defendant was sentenced to an indeterminate term of imprisonment of not more than three years, and upon the defendant's conviction of the crime of Criminally Selling a Dangerous Drug in the Second Degree in violation of Section 220.35 of the Penal Law of the State of New York, the defendant was sen-

tenced to an indeterminate term of imprisonment of not more than three years, to run concurrently with the first above sentence.

Defendant appealed the aforesaid judgment of conviction to the Supreme Court, Appellate Division, Third Department, which by unanimous decision dated June 29, 1972, affirmed the judgment of conviction (*People v. Terraciano*, 39 A. D. 2d 1005). Leave to appeal to the Court of Appeals was denied by Charles D. Breitel, Associate Judge of the Court of Appeals, by order dated September 15, 1972. Defendant petitioned for a writ of habeas corpus which was granted by order of the District Court for the Western District of New York, John T. Curtin, Judge, 360 F. Sup. 1377 (W. D. N. Y. 1973). The order of Judge Curtin was appealed to the United States Court of Appeals for the Second Circuit and the order granting the writ was reversed, with instructions to dismiss the petition.

POINT I.

Warrantless administrative search of a druggist's required business records and prescriptions is not violative of petitioner's constitutional rights.

Learned counsel for the petitioner in the case at bar seem to suggest that the facts here coincide in some manner with *Colonnade Catering Corp. v. United States*, 397 U. S. 72 (1970). However, *Colonnade* dealt with a forcible and general search and this court clearly held that the statute in that case made no provision therefor and that the search was unconstitutional. In the case at bar there is no evidence of forcible entry and the record is clear that defendant did not object to the search in question. Furthermore, in the case at bar, there is

no general warrantless search, the inspector having audited and seized only those records of the defendant required to be kept by law.

There is a suggestion in the brief for petitioner that the fact that the search may have been made for the purpose of discovering criminal evidence vitiates its legality in any event. It is respectfully submitted that the statute under which the search was conducted was for the purpose of regulating the drug trade in the interests of the public by controlling abuses and excesses therein. Clearly had the audit been made routinely and the evidence in question uncovered there would have been a basis for criminal liability. It seems unusual to suggest that when there is reason to believe that the abuses and excesses for which the statute was passed have taken place that the persons vested with the right and obligation to audit the druggist's books may not then conduct an audit in compliance with the statute and utilize the evidence obtained in a criminal action. In a rather well reasoned opinion in a recent lower court case in New York State this very question was considered. In *People v. Curco Drugs, Inc.*, 76 Misc. 2d 222 (Kings Co. Crim. Ct. 1973) the court stated:

> "Given this conflict of authority, I treat this issue as one of first impression. The importance of the defendant's interest in obtaining the protection of the Fourth Amendment must be balanced against the public interest of the Health Department in making an inspection without a warrant. As I read the *Biswell* case, there is no evidence that in making its decision, the Supreme Court relied on the fact that the inspection was routine. The court, in *Biswell*, discussed the importance of frequent unannounced inspections as a credible deterrent to violations of the act. However, here the officers knew about the violations and the obtaining of a warrant would not have

seriously undermined the act's purpose of deterring violations. Clearly, it would have been only a minimal interference with their duties to obtain a warrant. On the other hand, I find that the defendant's interest in asserting the Fourth Amendment right is similarly weak. The defendant clearly knew his books which, by statute he is required to maintain, would be subject to inspection by the Health Department at any time. On balancing these interests, I find, despite the minimal inconvenience involved, it would be a meaningless formality to require the Health Department inspectors to obtain a warrant to inspect records which, by statute, they have a legal right to search anyhow."

Conflict in the Circuits.

Counsel for the petitioner suggest, as a basis for this court to grant a writ of certiorari, there was a conflict in decisions handed down in the Second and Ninth Circuit Courts of Appeal and specifically refer to the holding in *United States v. Davis*, 482 F. 2d 893 (1973). The factual situation in the *Davis* case is not at all analogous to the case at bar. There a search was conducted pursuant to the anti-sky-jacking regulations which do not deal with a traditionally state regulated industry requiring the keeping of written records. Furthermore, the primary issue in *Davis* was whether defendant had consented to the search and that question turned on whether he appreciated his alternative of refusing to be searched and forfeiting the right to fly. With regard to regulated industry requiring the keeping of written records the issue of implied consent has been settled by this court in *Biswell v. United States*, 406 U. S. 311 (1972), and *Colonnade Catering Corp. v. United States, supra.* There the court held that consent may be established through the free and voluntary submission to reasonable regulatory authority by the acceptance of a license. There-

fore, the case at bar and the *Davis* case are completely distinguishable and there is no conflict between the Second and Ninth Circuits.

POINT II.

The New York Public Health Law provisions providing for administrative searches are limited in time and place.

In *United States v. Biswell, supra,* and *Colonnade Catering Corp. v. United States, supra,* the Supreme Court indicated that certain administrative inspections pursuant to statutes, without search warrants, satisfied the requirements of the Fourth Amendment of the United States Constitution. As the court below correctly pointed out, a state statutory scheme must reasonably limit the time, place and scope of these inspections.

While the statutes in question in *Biswell* and *Colonnade Catering Corp.* explicitly limited investigations so that these constitutional requirements were satisfied, as Mr. Chief Justice Burger pointed out in his dissent in *Colonnade,* page 78, such an explicit statutory limitation is not always necessary.

> "The government agents needed neither a warrant nor these statutes to secure entry to this place of business since it was as open as any business establishment that seeks to sell goods and services to the public. The agents need to rely on the statutes only to carry out their duty to inspect after accomplishing entry."

Section 3390 of the New York Public Health Law must be interpreted narrowly.

> "Thus, a statute which could have been interpreted broadly, but which was also capable of a more restricted interpretation, was held not to violate, per se, the first amendment. This is a general rule. Statutes should be narrowly interpreted to sustain their constitutionality. (See *Cameron v. Johnson*, 390 U. S. 611 [1968], taken from *Douglas v. Pitcher*, 319 F. 706 [E. D. La. 1970].)"

The New York Public Health Law only authorizes agents to inspect certain types of records. It does not give these agents the power to enter any private premise or public premise when the latter is not open to the general public.

The words "at all times" cannot be read as generally authorizing unlimited searches. If the state Legislature intended to give agents this authority, it certainly would have chosen more explicit language. These words must mean that, "at all times" when the agents may lawfully be on the premises, they may lawfully inspect the records.

With regard to whether the New York statute is limited as to time and place it is respectfully submitted that the court must consider the statute and the regulations promulgated thereunder. The statute provides, *inter alia*, that the persons permitted to inspect and audit records shall have access at all times to those records "to be kept under this Article." New York Public Health Law, Sections 3350 and 3390. The regulations provide that the records required to be kept shall be kept on file at the pharmacy and since the statute does not provide for forcible entry it is only reasonable and logical to interpret the statute to provide that the audit shall be conducted during regular business hours and must be conducted at the pharmacy since that is where the records are required to be kept. (See page 15 of Record.)

Finally, it has been held by this court that a state's interpretation of its own statute is binding on the Federal Courts. *Fox v. Washington*, 236 U. S. 273; *Winters v. New York*, 333 U. S. 507. The very statutory scheme in question has been interpreted as being constitutional in the *Curco Drugs, Inc.*, case hereinbefore referred to and, interestingly, that case was referred to and relied upon by Judge Friendly in the court below.

POINT III.

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Minutes of Hearing, Dated February 17, 1970.

At an adjourned December, 1969, Term of Chemung County Court, held in and for the County of Chemung, at the Chemung County Courthouse, Elmira, New York, on the 17th day of February, 1970.

STATE OF NEW YORK, COUNTY COURT.

COUNTY OF CHEMUNG.

PEOPLE OF THE STATE OF NEW YORK

against

SALVATORE TERRACIANO,

Defendant.

Present:

Honorable Donald H. Monroe, Chemung County Judge & Surrogate.

Appearances:

D. Bruce Crew, III, Esq., Assistant District Attorney, Attorney for the People, 226 Lake Street, Elmira, New York.

Samuel J. Castellino, Esq., Attorney for Defendant, 414 East Church Street, Elmira, New York.

The Defendant, in person.

Mrs. Betty Mitchell, Deputy County Clerk.

Stenographer:

George F. Barringer, County Court Reporter.

The Court: People of the State of New York against Salvatore Terraciano. The defendant is present with counsel, Samuel Castellino, and the People are represented by Assistant District Attorney Crew. This is going to be a hearing.

Mr. Crew: If it please the Court, I have this day served Mr. Castellino with an 813 (f) notice. There isn't any question that this comes as a surprise to Sam, and I have discussed this with him, and he graciously consented I put in whatever proof I have subject to rights not only of cross examination but presentation of any proof you want. Obviously we have no objection to that at all.

Mr. Castellino: Yes. I would want the record to show I would reserve my right to produce any additional evidence relative to the introduction of testimony with respect to admissions, statements or confessions.

The Court: Proceed.

Mr. Crew: Mr. Kowitt.

(Whereupon, People's exhibits 1 & 2 marked for identification.)

THEODORE KOWITT, called as a witness, having been first duly sworn, was examined and testified as follows:

Examined by Mr. Crew:

Q. What is your full name, sir? A. Theodore Kowitt.

Q. And by whom are you employed? A. I am employed by the New York State Narcotics Control Bureau as a senior narcotic investigator.

Q. Were you so employed on April 14, 1969? A. I was.

Q. And did there come a time on that day that you had occasion to go to the Windsor Pharmacy in Horseheads, New York, and make the acquaintance of the defendant, Salvatore Terraciano? A. I did.

Q. And when you arrived at the pharmacy on this day, did you identify yourself to Mr. Terraciano? A. Yes, I did.

Q. Did you tell him who you were? A. Yes, I did.

Q. Did you tell him why you were there and in the course of telling him why you were there, did you advise him of any rights? A. Yes, I did.

Q. Will you tell the court what you told him as to the purpose for which you were there and what you told him in your own words as to any rights he might have had? A. I advised Mr. Terraciano that I was conducting an investigation relative to diversion of controlled drugs in Chemung County. I stated that I was there to conduct an audit of narcotics, accepted narcotic preparations and depressant and stimulant drugs. I advised him that he did not have to make any statement to me. Anything he stated to me would be used against him. I told him that he had the right to be represented by an attorney, and if he could not afford an attorney, one would be provided for him. I asked him if he understood what I had just advised him. He stated, "Yes." I asked him if he wished to call his attorney, and he stated that he would.

Q. And did he then use the telephone? A. Shortly thereafter, yes.

Q. And between the period of time he said he would like to and he used the telephone, did you question him about any items in the drug store? A. Not to the best of my recollection. He went to the back of the pharmacy, and I started taking out my books and records.

Q. All right. And following his making a telephone call, did there come a time that a third person arrived at the Windsor Pharmacy? A. Yes.

Q. And did the defendant represent him to you to be his attorney? A. Yes, he did.

Q. And what, if anything, if you recall, in words or substance did the attorney say to you relative to your

presence at the Pharmacy? A. I don't remember his exact words, but the gentleman who represented himself as the attorney stated something to the effect that it was beneficial—first he stated he asked me who I was. I showed him my identification. He asked me if I was with the state or federal narcotic bureau. I stated I was with the State of New York. He stated something in substance to the effect that it was beneficial or advantageous that a representative of the narcotic bureau was there conducting an investigation rather than the regular police. As I say, I do not recall the exact words that he used.

Mr. Castellino: Well, if the Court please, could we have a better description of this person if the witness knows his name, who was there, whether the defendant was present? There is a question whether such a statement is binding upon this defendant, of course.

Q. (By Mr. Crew) Was the defendant present at the time? A. The defendant was present at the time, yes.

Q. Do you know the name of the man who the defendant said was his attorney? A. I do not recall the person's name.

Q. Are you able to describe him at all? A. I do not recall his features that well. If I remember, he was not a very tall man. I cannot really recall what he looked like.

Q. All right. Now, after this conversation with this person, did he leave the premises? A. Yes, he did.

Q. Did you go on to conduct an audit? A. Yes, I did.

Q. Now, during the course of this audit, did you have occasion to examine various purported prescriptions that were there on the premises? A. Yes, I did.

Q. And while you were doing this, did you have occasion to ask the defendant whether or not those prescriptions were kept by him in the regular course of his business at the Windsor Pharmacy? A. Yes, I did.

Q. What did he tell you? A. He stated that the records were his, and he did keep them.

Q. And during the course of your audit, did you have occasion to remove certain of the records kept by the defendant at his place of business? A. Yes, I did.

Q. And did you advise him and show him those items or records that you were taking with you? A. Yes, I did.

Q. Did you give him a receipt for the records which you took? A. Yes, I did.

Q. Did you sign that receipt? A. Yes, I did.

Q. Was that receipt also signed by the defendant? A. Yes, it was. There were two receipts that were made out. One I kept, one was given to Mr. Terraciano.

Q. And, were these receipts signed in your presence? A. Yes, they were.

Q. And I show you People's Exhibit 1 for identification, and I ask you if that is an exact Xerox copy of all the receipts which you gave to the defendant while you were conducting this audit? A. Yes, they are.

Q. And, during the course of your investigation, did you have occasion to note on some of the prescriptions kept by the defendant at his place of business notations of alleged or purported refills on the reverse side of the prescriptions? A. May I have that question again?

Q. Yes. Did you have occasion during the course of your audit to observe on some of the prescriptions kept by the defendant in his place of business purported refills or notation of refill on the reverse side of the prescriptions? A. Yes, I did.

Q. Did you have occasion to ask the defendant if those notations were made by him and kept in the regular course of his business? A. Yes, I did.

Q. What did he tell you? A. He stated that this date on the reverse side of the prescription indicated that the prescription had been refilled.

Q. And did he state that those notations were made by him? A. Yes, he did.

Q. And I show you People's Exhibit 2 for identification, and I ask you if you recognize that. A. Yes, I do.

Q. And is that the purported prescription, one of the purported prescriptions which you took from the defendant's place of business, one for which you gave him a duly executed receipt? A. Yes, it is.

Q. And with regard to People's Exhibit 2 for identification, did you have occasion to have a conversation with the defendant having to do with the preparer of that prescription? A. Yes, I did.

Q. And will you tell the court in words or substance what the defendant told you with regard to the preparer or purported maker of that prescription? A. Mr. Terraciano informed me that it was a telephone prescription that either the physician, Dr. Burke, or somebody in his office, had phoned the prescription in to him at the pharmacy.

Q. And this investigation that you conducted took place, did it not, on the 14th and 15th days of April, 1969? A. Yes, it did.

Mr. Crew: You're right. I offer both those exhibits in evidence.

Mr. Castellino: Well, I'd like an opportunity to cross examine on that.

Mr. Crew: Yes.

The Court: Yes.

Cross Examination by Mr. Castellino:

Q. Mr. Kowitt, how long have you been with the Narcotic Control Bureau? A. I have been with them since 1965.

Q. Since 1965. At whose direction did you go to the Windsor Pharmacy in Horseheads on April 14? A. I had received a request for assistance from the state police.

Q. Well, whom in particular in the state police? A. Sr. Investigator Michael Capozzi.

Q. What date did you receive that request? A. I'm sorry. I do not recall the exact date. I believe it was sometime in the beginning of April, 1969.

Q. Well, don't you have any notation or correspondence? A. It was a telephone call which I had received from Mr. Capozzi while I was at the Mercury-Comet dealer. I do not have any record of that with me.

Q. So there was no formal or written request from the state police? A. No, sir. The initial request was a telephone request from them.

Q. From Mr. Capozzi; is that right? A. Yes, Sir.

Q. And you don't recall the date or the approximate date? A. No, I don't. I can secure that information at a later time, but I don't have it with me.

Q. But it was in the form of request for you to go to Windsor Pharmacy located in Horseheads? A. It was a request for assistance in investigation, and it did concern the Windsor Pharmacy in Horseheads, New York.

Q. Now, did there come a time then when you came to Elmira? A. Yes; yes, Sir.

Q. When in relation to that phone call; couple of days? A. I believe that I had come to Elmira twice. The first day I don't recall. The second time was on the 14th of April, 1969.

Q. So you were here one day before the 14th; is that right? A. Yes, Sir.

Q. Did you confer with Mr. Capozzi then on this date? A. Yes, I did.

Q. Relative to the Windsor Pharmacy? A. Yes, I did.

Q. Did Mr. Capozzi give you certain information relative to what you were going to look for at the Windsor Pharmacy? A. No; no, Sir. He asked me to inspect the records, conduct an investigation relative to any diversion and to audit the stock of drugs which I mentioned.

Q. And this was a blanket investigation; is that right, of the records of the Windsor Pharmacy? A. This was an investigation of the records, receipt and disposition being maintained at Windsor Pharmacy; yes.

Q. So you were not looking for anything in particular when you went to the Windsor Pharmacy; you were going to audit the records? A. Audit the records and any evidence of violations of the Public Health Law.

Q. How long did you spend at Windsor Pharmacy on auditing the records? A. I had spent approximately two days on April 14th and April 15th, 1969.

Q. And prior to this time, had you ever had occasion to go to the Windsor Pharmacy and conduct an audit of the records? A. No, I believe I had been there once before, just a routine inspection of the records.

Q. Just a routine inspection? A. Yes.

Q. Now, when you went there on the 14th of April, you did not have a search warrant; did you? A. No, Sir; I did not.

Q. Had you at any time made application for a search warrant? A. No, Sir; I did not.

Q. Did Mr. Capozzi go with you on the 14th to the Windsor Pharmacy? A. He had entered the pharmacy with me, stayed a short time and then left.

Q. Did he participate in the investigation at that time? A. Participate; no, Sir. He witnessed my identifying myself and initially advising Mr. Terraciano why I was there and witnessing my advising him of the rights.

Q. Now, you told him you were there to audit these records under what authority? A. As a member of the Narcotic Control Bureau of the State of New York and pursuant to Article 33 and 33a of the Public Health Law.

Q. So you expressly stated to Mr. Terraciano that you were there to audit these records under the authority as set forth in the Public Health Law; is that right? A. Yes, Sir.

Q. And you so stated this in an affidavit that was submitted under date of January 9, 1970? A. May I see it?

Mr. Castellino: I'll have this marked.

(Whereupon, Defendant's Exhibit A was marked for identification.)

Q. (By Mr. Castellino) Now, I show you defendant's Exhibit A for identification which purports to be a copy, true copy of an affidavit signed and sworn to by you. Do you recognize that? A. Yes, I do.

Q. And do you recall signing and swearing to that? A. Yes, I do.

Q. Had you prior to signing this affidavit had occasion to read or see the original or affidavit of Mr. Terraciano attached to certain motion papers in this proceeding? A. Not to the best of my recollection, no.

Q. Now, in this affidavit, and specifically with reference to the second paragraph which commences on the 14th and 15th days of April, 1969, that you conducted an accounting of Narcotic Drugs at Windsor Pharmacy in accordance with the powers and duties conferred upon deponent by Articles 33 and 33a of the Public Health Law of the State of New York; is that correct? A. Yes.

Q. And you, also, state that you conducted aforesaid accounting and removed the aforesaid records in accordance with the provisions of such law and Section 80.72 and 81.80 of Title 10 of the Codes, Rules and Regulations of the State of New York; is that correct? A. If it states it; yes, Sir.

Q. And this is the basis of the authority under which you were conducting this investigation and under which you removed the records; is that correct? A. That's correct.

Q. Now, do you have with you a copy of these codes and rules and regulations of the state? A. I do, Sir.

Q. Could you, for the benefit of the court and myself, tell us specifically what the section 80.72 and 81.80 of Title 10 contains?

Mr. Crew: Your Honor, just for the record, I'm going to object to that question on the grounds that this is a code of the State of New York which is a matter of law. You can take notice of it and the contents of which you can consider. I don't see why he should read it into the record.

The Court: Proceed.

Mr. Castellino: I feel it should be part of the record.

The Witness: You'd like me to read the entire section 80.72?

Q. (By Mr. Castellino) What I'd like you to do is read that portion or portions of it you're referring to in your affidavit in which you say you removed the aforesaid records and which you conducted the accounting.

Q. "80.72 Receipts for prescriptions. Narcotic prescriptions which are on file at a pharmacy and which may be required as evidence of a violation in connection with an investigation by this department shall be released to a narcotics investigator upon his request and upon furnishing a receipt therefor on a form provided for that purpose bearing the notation: In order to conform with the Federal Harrison Narcotic Act and Section 3322 of the New York State Narcotic Drug Law, this receipt must be kept on file for at least two years."

"81.80 General.

"(a) All records of all transactions concerning fully controlled (C-1, inventory required) depressant and stimulant drugs required to be kept by a practitioner, manufacturer or wholesaler, pharmacy, hospital, nursing home, convalescent home, home for the aged or other authorized person shall be kept for a period of two years from the date of transaction as provided for by Section 3388 of Article 33(a) of the Public Health Law.

"(b) All records, orders and prescriptions required by regulation or Article 33(a) of the Public Health Law shall be readily available and promptly produced upon request for inspection by authorized representatives of the Bureau of Narcotic Control, New York State Department of Health.

"(c) All such orders, orders and prescriptions required by regulation or provisions of Article 33(a) of the Public Health Law shall be maintained at the premises certified or licensed

"(d) All such records, orders and prescriptions required to be maintained by regulation or Article 33(a) of the Public Health Law and which may be required as evidence of a violation in connection with an investigation by this department shall be released to authorized representatives of the Bureau of Narcotic Control, New York State Department of Health upon request and upon furnishing a receipt therefor."

Q. Those are the specific rules and regulations that you referred to in your affidavit; is that right? A. Yes, sir.

Q. And you, also, referred to articles 33 and 33 (a) of the Public Health Law; is that correct? A. Yes, I did.

Q. And in doing so, I assume, I would like to know, you obviously are familiar with the contents of Section 3390 of the Public Health Law; is that correct? A. I am familiar with it. If I may just refer to it. Yes, I am.

Q. You have a copy of Section 3390 of the Public Health Law before you? A. Yes, I do.

Q. And that's entitled, "Enforcement"? A. Yes, sir.

Q. And, specifically, with reference to Section 3390, subdivision 2, does that state that such authorities and their agents shall have access at all times to all orders on prescriptions and records to be kept under this article? A. Yes, it does.

Q. Were you, in part, relying on Section 3390 of the Public Health Law when you went to the Windsor Pharmacy? A. Yes. Yes, I was.

Q. Is there any other specific section in Article 33 or 33(a) of the Public Health Law upon which you relied in conducting this audit and removing the records from the Windsor Pharmacy? A. The other section would be 3350 of Article 33(a).

Q. And that is entitled what? A. "Enforcement."

Q. And does that contain provisions comparable to those set forth in 3390? A. Yes, sir; it does.

Q. Are they identical provisions, or are they different in some respect? A. I don't—I'd have to compare the two.

Q. You did, in fact, also rely on Section 3350 of the Public Health Law; is that right? A. Yes, sir.

Q. And doesn't 3350, subdivision 2, contain a statement that such authorities and agents shall have access to all prescriptions set forth under this article? A. Yes, sir; it does.

Q. Now, Mr. Kowitt, when you went to the Windsor Pharmacy on April 14th of '69, were you not aware, sir, that Salvator Terraciano had been arrested previously by Investigator Capozzi as the result of Mr. Capozzi's attempt to examine his records? A. Yes, sir; I was aware of that.

Q. You were aware of that; were you not? A. Yes, sir; I was.

Q. Had you discussed this with Investigator Capozzi? A. Senior Investigator Capozzi mentioned the fact to me. I did not, I do not recall holding a detailed discussion about it. I was advised of the fact, yes.

Q. So you knew there was a criminal charge pending against Mr. Terraciano; isn't that correct? A. Yes, sir; it is.

Q. Now, by the time the attorney, and incidentally, with respect to this attorney you claim was present on April

14th, you recall that was not myself; do you? A. To the best of my recollection, it was not you, sir.

Q. Now, this attorney was not present when you went behind the counter and into the area where these records were kept; was he? A. When he came in the pharmacy, I was behind the counter, and I was inspecting the records.

Q. You had already commenced your inspection? A. The inspection of the records; yes, sir.

Q. And, again, this was done in reliance on these sections and regulations that you cited? A. Yes, sir.

Q. Did you do anything in addition to these purported warnings that you gave Mr. Terraciano? Did you tell him what was your purpose in being there that day? A. To the best of my recollection, I do not recall giving him any other purpose.

Q. You didn't tell him that you were there at the request of the State Police? A. Not to the best of my recollection, no.

Q. Did you tell him you were there to conduct a routine audit? A. No, sir; I did not.

Q. There isn't any question, Mr. Kowitt, that you didn't at that time ask Mr. Terraciano for permission to go into that area; did you? A. I stated, "Is it okay," or something to the effect in substance, "Is it okay if I begin?"

Q. If you begin? A. If I begin inspecting records and conducting the audit now.

Q. But on the presentation of your credentials, you walked right in? A. No, sir.

Q. What did you do? A. I walked over, identified myself, stated the purpose of my being there. I advised him of his rights, and then I stated, "Do you have any objections?"

Q. Now, you stated, "Do you have any objections"? A. Or may. I do not recall the exact words that were used.

Q. But you were relying on these sections and rules, which on their face give you the authority to enter a

place where prescriptions are kept and audit them; don't you? A. Yes, sir. The reason I stated this was there was some question as to whether he wished to call his attorney or not.

Q. And you, also, knew, did you not, that he had refused Investigator Capozzi permission to examine these records just a few days previously? A. I knew that he denied them that, but I did not recall the exact date.

Q. Now, how long did this audit take? A. The investigation, consisting of inspection of records, conducting of the audit, conducted approximately two days on the 14th and 15th of April, 1969.

Q. Two full days? Partial days or how long? A. On the 14th it was part of the morning, the entire afternoon and part of the evening; and on the 15th it was the morning and the afternoon.

Q. Did you examine each and every prescription on file there? A. No, sir. I examined all of his narcotic prescriptions, all of his depressant and stimulant prescriptions for the time period that I had specifically asked for.

Q. And what time period was that? A. May I check the days? Sir, I do not have the dates, but to the best of my recollection it was within a two-year period from the date I had come in.

Q. When you went there, were you armed with any specific information relative to certain names or dates that you would be looking for? A. Not to the best of my recollection; no, sir.

Q. Well, you pulled and took with you certain records; did you not? A. Yes, sir; I did.

Q. And was this based upon what your investigation developed during that period, or was it based upon information that you were requested? A. This was based upon my own investigation which I conducted on the 14th and 15th of April.

Q. And without regard to any other information that may have been given to you by Investigator Capozzi; is that right? A. Not to the best of my knowledge, sir.

Q. Not to the best of your knowledge. A. Not to the best of my recollection.

Q. You just conducted the investigation in April; did you not? A. Yes, sir; I did.

Q. You're having trouble and difficulty remembering today? A. To the fact I just stated; yes, sir.

Q. Did you receive any written memoranda or request at all from Investigator Capozzi or the District Attorney's Office, Mr. Kowitt, prior to going there? A. No, sir.

Q. Well, with respect to People's Exhibit 2 for identification, this purports to be what? A. This purports to be a telephoned prescription for a stimulant drug.

Q. And what was your reason in taking that with you? A. Two reasons: It appeared suspicious to me, because number one, it was on the blank of a pharmacy in Florida; namely, the Alonzo Drug Store in Tampa, Florida. And number two, the fact that the prescription had been renewed five times, since it was a telephone prescription.

Q. So, on the basis of suspicion, then, you removed that; is that correct? A. Yes, sir.

Q. And how about with respect to these other items that you took, these other records; were they, also, removed because of certain suspicions on your part? A. Either for suspicion or evidence a violation of the Public Health Law.

Q. Either upon suspicion or for evidence to be used in a possible violation; is that right? A. Yes, sir.

Q. No question about that; is there? A. No, sir.

Q. You were there seeking evidence; were you not? A. I was there to conduct an investigation.

Q. And to obtain any evidence that you might? A. And to remove any pertinent evidence to that investigation; yes, sir.

Q. And all this without any benefit or direction of a search warrant; right? A. That's correct, sir.

Q. Now, I show you People's Exhibit 1 for identification, and in the upper left hand corner there is the date 4-14-69 and a statement that, "I have this date removed eight narcotic prescriptions from the files of Windsor Pharmacy," and then the location and the dates 5-18-68 to 6-28-68; is that correct? A. That's correct.

Q. Now, with respect to those particular prescriptions, was there any specific or particular reason why they were removed as opposed to others that were not? A. Yes, sir. Before I inspected the prescriptions files, I inspected the narcotics tax stamp and opium order forms. The opium order forms revealed that narcotic drugs had not been purchased by Mr. Terraciano before July of 1968.

Q. So it was on that basis that you removed these some eight prescriptions; is that right? A. Yes, sir.

Q. Now, over to the right hand corner of the first page is what purports to be another receipt; is that correct? A. Yes, sir.

Q. And what does that recite? A. The receipt states that I removed nine depressant and stimulant prescriptions from the files of Windsor Pharmacy dated 7-19-68 to 12-20-68, and the prescriptions called for a total of Seconal, 1½ grain, number 88; and Dexedrine Spansules, 15 milligrams, number 1340, and refills through 4-10-69.

Q. Were those nine in addition to the eight, other eight that you previously described? A. Yes, sir.

Q. So with respect to the other receipts, do these all record various other items and records that were removed by you? A. Yes, sir.

Q. And the second page in the lower right hand corner, receipt dated 4-15-69 recites that you removed some 17 DS records; is that correct? A. Yes, sir.

Q. Those are, DS refers to what? A. Depressant and stimulant.

The Court: What?

The Witness: Depressant and stimulant.

Q. (By Mr. Castellino) Were these prescriptions or records or what? A. May I see the receipt, sir? These were 12 depressant and stimulant drug invoices and five copies of letters from the Windsor Pharmacy relative to alleged returns of depressant and stimulant drugs.

Q. Now, Mr. Kowitt, did there come a time that you appeared before the Grand Jury in Chemung County relative to your investigation and audit of the records of the Windsor Pharmacy? A. Yes, I did.

Q. Do you recall when that was? A. I believe that the Grand Jury had been held on August 11, 1969.

Q. And did you, sir, testify before that Grand Jury relative to certain of these records, prescriptions or written memoranda that you removed from the Windsor Pharmacy? A. Yes, I did.

Q. Do you recall, sir, how many of the records, prescriptions or memoranda that you removed from the Pharmacy that you testified to before the Grand Jury? A. No, sir; I do not.

Q. I show you with reference to People's Exhibit 2 for identification; do you recall testifying with respect to that exhibit before the Grand Jury? A. Yes, I do.

Q. Was there anyone else with you at the Windsor Pharmacy other than the person you described on the first day; anyone else assist you in this audit or investigation? A. On the 14th and 15th of April; no, sir.

Q. Did you confer with Mr. Capozzi following your audit on the 14th and prior to your returning on the 15th? A. Yes, I did; on two occasions after that.

Q. Relative to certain records that you had removed or observed? A. Regarding the records and the investigation which I had conducted?

Mr. Crew: No. He wants to know, Ted, after the 14th, but before you returned on the 15th, did you confer with Capozzi.

The Witness: Oh, no. I do not believe so.

Q. You don't believe so? A. No, sir.

Q. Are you saying you didn't? A. To the best of my recollection; no, sir.

Q. Did you confer with any member of the District Attorney's office following the 14th investigation and your return on the 15th? A. Not to the best of my recollection.

Q. Did you make any written notes of this audit? A. Yes, I did.

Q. Do you have those with you? A. They are in my office.

Q. And your office is where? A. 119 East Main Street, Rochester, New York.

Mr. Castellino: May I see the Grand Jury minutes?

Mr. Crew: Sure.

The Court: You'd probably like a few minutes to look that over; wouldn't you?

Mr. Castellino: Yes.

The Court: We'll take a short recess for that purpose.

(Whereupon, a short recess was taken.)

(After recess, in the presence of the Court, the defendant and counsel for the respective parties, the following proceedings were held.)

Q. (By Mr. Castellino) Mr. Kowitt, do you recall when prior to April 14th of '69 that you had been at the Windsor Pharmacy? A. I had been there on January 31, 1969.

Q. And did you not have occasion at that time to go through the narcotic file?

Mr. Crew: You mean did he have an opportunity, or did he do it?

Mr. Castellino: Did he do it.

The Witness: I had inspected certain prescriptions, certain narcotic prescriptions, I believe, in regard to one particular patient.

Q. (By Mr. Castellino) Do you—you were only looking for one particular prescription at that time; is that correct? A. I was looking for any narcotic prescriptions relative to one particular individual.

Q. But you didn't conduct any type of general audit or investigation at that time? A. No, sir; I did not.

Q. That was in January of '69? A. Yes, sir.

Q. And these files were available to you at that time; were they not? A. Yes, sir; they were.

Q. Now, do you recall telling Mr. Terraciano on the 14th of April of '69 that if he cooperated, of course, you would make that fact known to your superiors? A. I told him that the facts regarding the availability and accuracy of records would be made known.

Q. The facts regarding availability? A. Availability and accuracy. The results of the audit was basically what it boiled down to.

Q. And the extent of his cooperation in that audit; did you not? A. His cooperation in that audit in regard to making the availability and assisting me in the audit; yes, sir.

Q. You told him that that fact would be duly reported to your superiors; did you not? A. Yes, I did.

Q. But the records were there, and you claimed the right to examine them under the provisions that you have previously cited anyway; did you not? A. Yes, sir.

Q. Now, at page 42 of the transcript of the Grand Jury minutes, a copy of which has been furnished me by the District Attorney at line 18, do you recall this

question being asked: "Mr. Kowitt, I show you People's exhibits one through twelve and ask you to examine them and tell me if you recognize them." Your answer: (Witness examined one through twelve) Your reply: "These are prescriptions which I removed from files maintained at Windsor Pharmacy at Horseheads, New York." Do you recall, in words or substance, that question and that answer? A. Yes, sir.

Q. And do you recall, sir, then testifying or being questioned with respect to these, some twelve exhibits in the Grand Jury? A. Yes, sir.

Q. Those were all exhibits which you had personally removed from the Windsor Pharmacy; isn't that correct? A. Yes, sir.

Q. Did you have occasion to discuss these exhibits with Investigator Capozzi before your testimony in the Grand Jury? A. Yes, sir.

Q. Did you have occasion to discuss the exhibits, either all or any one of them with any person or persons whose names might have appeared thereon prior to your testifying before the Grand Jury? A. May I inquire, the names that appear thereon? Are you referring to the names on the prescriptions?

Q. Yes. A. No. I did not interview any of the people whose names appeared on the prescriptions.

Q. Now, isn't it true, Mr. Kowitt, that based on your inventory here, you removed many items and many records; did you not? A. Yes, I did.

Q. Substantially more than twelve or thirteen that you identified in the Grand Jury; isn't that correct? A. I removed all of the items which appear on the receipts on those two pages.

Q. Now, you did not testify as to all these items that you removed in Grand Jury; did you? A. Not to the best of my recollection.

Q. Well, if the Grand Jury recites that you identified some 13 exhibits which were removed from the Windsor

Pharmacy, this would indicate that there were many other records removed that you did not have occasion to testify to regarding them in the Grand Jury; isn't that correct? A. Yes.

Q. Did you have occasion to confer with Investigator Capozzi and to examine these exhibits in his presence prior to Grand Jury? A. Yes, I did.

Q. And was a member of the District Attorney's office present during this conference, or if there was more than one conference? A. I can remember one conference where a representative was present; yes, sir.

Q. So, isn't it fair to say, Mr. Kowitt, that you, when you went to the Windsor Pharmacy on April 14th of '69, you were there to conduct a general audit of all narcotic and depressant records there; isn't that correct? A. I went there to audit specific, certain selected narcotic drugs, depressant and stimulant drugs and excepted narcotic preparations and inspect records and conduct an investigation relative to those records.

Q. You were not forearmed with any specific items or prescriptions or names that you were looking for? A. Not to the best of my recollection, sir.

Q. You were merely going to check certain categories or items of drugs; isn't that right? A. Yes, sir.

Q. The records of such drugs.

Mr. Castellino: I have no further questions.

Re-direct Examination by Mr. Crew:

Q. Mr. Kowitt, at the time that you went to the Pharmacy on April 14th, 1969, were you a duly representative of the New York Narcotic Control Bureau? A. Yes, sir; I was.

Q. And when you removed the various records that you have testified to from the pharmacy, did you give a receipt upon forms provided by that department pur-

suant to Title 10 of the Codes, Rules and Regulations of the State of New York? A. Yes, I did.

Q. And, Mr. Kowitt, after you arrived there on the 14th day of April, 1969, and advised the defendant of the rights that you have testified to and particularly concerning his telephoning of an attorney, approximately how long would you say, how much time would you say elapsed from the time you advised him of these rights until this person arrived, who was purported to you to be an attorney? A. I would say approximately an hour to two hours, perhaps.

Q. Something between an hour and two hours? A. I'd say within that time period approximately. Yes.

Mr. Crew: That's all.

Re-cross Examination by Mr. Castellino:

Q. So that you had during that lapse of time an opportunity and, in fact, you did examine these records and commence your investigation? A. I did begin to inspect the records. Yes, sir.

Q. Do you recall Mr. Capozzi making any statement to you on his departure from the Windsor Pharmacy on that date with respect to your investigation? A. No, sir; I don't.

Q. You don't recall him saying in words or substance, if you find anything, let me know? A. No, sir; I do not.

Mr. Castellino: I have no further questions.

Mr. Crew: Thank you, Mr. Kowitt.
The Court: Excused.

Mr. Crew: Offer People's exhibits one and two for identification into evidence, Your Honor.
Mr. Castellino: I have no objections.
The Court: Received.

(Whereupon, People's exhibits 1 and 2, heretofore marked for identification, were received in evidence.)

The Court: In this motion to suppress, does the defendant have any evidence?

Mr. Castellino: Yes. I wish to call Mr. Terraciano.

The Court: Now, in order to clarify this, are we just dealing with the motion to suppress, and do you wish to defer?

Mr. Castellino: On the question of the Miranda warnings and statements and confessions, because I did not know until this morning that Mr. Mustico—I think the record will eventually bear me out—Mr. Mustico's presence relative to the advice on these, Your Honor.

SALVATORE TERRACIANO, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Castellino:

Q. Your name is Salvatore Terraciano? A. Yes, sir.

Q. Where do you live, Mr. Terraciano? A. 224 Oriole Drive, Horseheads.

Q. Are you the proprietor of the Windsor Pharmacy located on 204 Gardner Road, Horseheads? A. Yes, sir.

Q. How long have you conducted the business there? A. Since May of '68.

Q. May of '68? A. Yes, sir.

Q. And are you a duly licensed pharmacist? A. Yes, sir; I am.

Q. In the State of New York; how long have you been so licensed? A. Since 1951.

Q. Now, do you recall April of 1969, specifically on or about the 10th day of that month when an individual identified to you as Michael Capozzi of the New York State Police came to your establishment? A. Yes, sir.

Q. And was he alone on that date? A. Yes, he was.

Q. And he identified himself to you? A. Well, he came, actually he came behind the counter. Actually he came behind the counter before he identified himself. In other words, the drug counter is up front, and he walked directly behind it. Then he presented his credentials without saying, actually came behind the counter.

Q. Would you describe this counter as it relates to the rest of the store? A. Yes. Well, the prescription counter is to the right and the drug counter to the left coming in the front of the store. And there is a very narrow, well, there is a space from the end of the drug counter that takes you behind the drug counter to the prescription department.

Q. Well, that area is not open to the general public? A. No, sir; it's not.

Q. All right. What occurred on that date? A. Well, the best of my knowledge that day this Mr. Capozzi, as I later found out his name; I didn't know him prior to the time he came in and walked directly behind the drug counter and produced his credentials and said he wanted to see my records.

Q. All right. What, if anything, occurred? A. And he showed me his credentials real fast and I said, "Just a minute" and picked up the telephone and called my attorney, and the line was busy at that time. Well, he says—

Mr. O'Mara: Who was that? I'm sorry.

The Witness: I picked up the telephone and called my attorney.

Mr. O'Mara: And you said somebody.

The Witness: The line was busy.

Mr. O'Mara: I see.

The Witness: I tried again, I think, and he started to say that he has a right to come behind to inspect the records. I said, "Just a minute. I want to make sure you do. I want to check and see if you do actually have the right," and he got a little bit hot under the collar so to speak, and I dialed again. I was trying to get ahold of Frank Panzarella, who was my attorney at that time.

Q. (By Mr. Castellino) Mr. Panzarella represented you previously in other matters? A. Yes, he did. He actually did the legal work in opening up the store.

Q. Which was not related to any criminal charge. A. No, sir.

Q. So he had represented you on other occasions? A. Yes.

Q. All right. Continue. A. So, I think I dialed again, and I couldn't get Frank. So I tried to get John O'Mara and couldn't get him either. The line was busy, something; I don't remember which. Mr. Capozzi—I didn't know him previous to this—he said, "Are you refusing me access to records?" He tried to put words in my mouth.

Mr. O'Mara: I object to that, Your Honor, what he's trying to do.

The Witness: That's exactly what I told him.

The Court: Exactly?

Mr. O'Mara: You said that?

The Witness: That's exactly what I said to him: "Are you trying to put words in my mouth? I'm not refusing you anything. I'm just exercising my constitutional right to check with my attorney. As far as I know, you have no right. As long as I have been a pharmacist I have never had the State Police or law enforcement come in. As far as I know, they have no right to come behind that drug counter.

Q. (By Mr. Castellino) All right. Continue. A. So with this he says to me some words—this is not verbatim. As far as I recall he says to me, "I haven't got any time to waste around here," and huffs around and goes out the door.

Q. Did there come a time when he returned? A. He returned, I believe this was on a Thursday and came back the following day in the afternoon with, I think, four other policemen and with a warrant for my arrest.

The Court: Would that be April 11th you're talking about?

Q. (By Mr. Castellino) Would that be the 11th, the next day? A. I believe so. I don't remember the date. It was the following day after that Thursday.

Q. And this warrant charge you with— A. —Obstructing Government Administration.

Q. And were you taken and arraigned on this charge in a Village Court? A. He, Mr. Capozzi, came in, and he said, he says, "I'm arresting you." I said, "What's the charge?" And he showed me a warrant for my arrest and said, "We are taking you down to police headquarters." I said, "Okay. Fine. Can I leave the lights on?" Some words to the effect, "Can I put a sign on the door and put my coat on?" With that, the four policemen and myself and Mr. Capozzi went in the police car down to the police station in Horseheads.

Q. Was this as a result of the incident that occurred on the previous day when Mr. Capozzi was there? A. Yes, it was.

Q. You were arraigned on this charge. You did not plead guilty to that charge; is that correct? A. That's correct.

Q. And there was subsequent proceedings in that Village Court on that charge; isn't that right? A. Yes, sir.

Q. Now, did there come a time following your arraignment that Mr. Kowitt from the State Narcotics Control Bureau showed up at your establishment? A. Yes, he was; I think the following, that very next morning. This was Friday; he was in Monday with Mr. Capozzi.

Q. This was three days after you were arrested? A. That's correct.

Q. All right. Do you recall in words or substance any conversations that were had on Monday, April 14th, at your store in the presence of Mr. Capozzi and Mr. Kowitt? A. And Mr. Capozzi came in with Mr. Kowitt, and I think he introduced Mr. Kowitt, who I think presented his credentials, and he said, "Let Mr. Kowitt in behind the drug counter to this prescription department," and Mr. Capozzi said, "Let me know if you find anything, Ted."

Q. And with that did Mr. Capozzi leave? A. I think within a matter of a few minutes he left.

Q. At that time, did Mr. Kowitt or Mr. Capozzi exhibit any search warrant to you? A. No, sir; they did not.

Q. Did you at any time on this date or any prior occasion consent to any audit examination or investigation of your records by Mr. Kowitt? A. No, sir; I did not.

Q. What—

Mr. O'Mara: Well, I object both to the question and to the answer. That's the question the Court is going to have to decide.

Mr. Castellino: Well, I submit this witness has a right to testify. What the Court finds following the conclusion—

The Court: I'll allow the question and give you a full chance to cross examine him.

The Witness: No, I didn't give any consent, but I felt the fact I had been arrested previously—

Mr. O'Mara: Object to what he felt.

The Court: Just leave out that word. Not what you felt.

The Witness: The fact I had been arrested previously by Mr. Capozzi and didn't want to get into any more trouble by refusing the New York State Narcotics Inspector to any records, and I was afraid of my further arrest.

Q. (By Mr. Castellino) Were you, also, familiar at that time with the rules and regulations and specifically the requirement under the Public Health Law? A. Yes, sir.

Q. And did you hear Mr. Kowitt this morning testify with respect to the contents of those rules and regulations with respect to accessibility and investigation and examination of your records? A. Yes.

Q. Did Mr. Kowitt at any time following the exhibition of his credentials ask you for your permission to go behind and examine your records? A. No, sir; he didn't.

Q. What, if anything, do you remember him saying to you with regard to the purpose. A. He said a routine investigation. This is something they do quite frequently in drug stores.

Q. Was any attorney present at that time? A. No, sir; not when he first came.

Q. Did there come a time when an attorney came? A. Yes.

Q. Who was that attorney? A. Lou Mustico.

Q. About how long after Mr. Kowitt arrived did Mr. Mustico come? A. I believe it was about an hour I would say, roughly. I don't remember exactly, but I believe it was about an hour after.

Q. What was Mr. Kowitt doing during that period of time? A. He was checking what they call an AB file, stimulant and depressant re-cross, and he had his brief case with him, and he was getting ready to start an audit.

Q. Did Mr. Kowitt, upon his entry behind the prescription counter say anything to you with respect to telling his superiors anything? A. He says they would ask him a question when he gets back if the pharmacist was cooperative, and this he has to. He says if he was cooperative; he says if he wasn't cooperative. In other words, he puts back a report as to whether or not I was cooperative.

Q. Had Mr. Kowitt had occasion to be in your pharmacy prior to the April 14th date? A. Yes, he was.

Q. Do you recall approximately when that was? A. Yes. It was sometime in January. I'm not sure of the exact date, but I had gotten a call from Mr. Kowitt Friday from his office in Rochester. He asked me about a possible forgery of a prescription from Doctor Game. Apparently he had gotten—

Q. Just with respect to what happened. Did he come to your store? A. Yes. He examined the whole narcotics file; right. And, also, the exempt narcotic book. He stamped it in there.

Q. How long did Attorney Mustico remain at the premises on the 14th; if you recall? A. To the best of my knowledge I think it was about a half hour. I don't know the exact time. I'm guessing about a half hour.

Q. Did he return at any time on this date or the next day? A. I don't believe so.

Q. Of course, there isn't any question but what Mr. Kowitt did remove records from your establishment? A. Yes.

Q. And he gave you a receipt for them? A. Yes.

Q. Do you recall, upon his arrival, his making any statement to you regarding certain rights with respect to any statement that you might make? A. He wanted me to sign an affidavit, and I told him I'd have to check with my attorney first.

Q. So you did not sign any statement? A. No.

Q. Did he tell you with respect to making any oral statements or admissions what your rights were? A. I can honestly say I don't recall.

Q. Did Mr. Kowitt at the time of his appearance on the 14th of April tell you under what authority, if any, he was acting in making this investigation? A. All he told me was it was a routine check, routine audit.

Q. He did not refer to any specific rules or laws or regulations? A. No, sir; he did not.

Mr. Castellino: I have nothing further.

Cross Examination by Mr. Crew:

Q. Mr. Terraciano, you were in fact cooperative with Mr. Kowitt? A. Yes, sir.

Q. You didn't tell him he couldn't examine your books; did you? A. I didn't say that. I didn't say it, no.

Q. You didn't tell him he couldn't take any of these? A. I felt if—

Q. Not what you felt. Did you tell him he couldn't take any of these things? A. No. I didn't tell him, no.

Q. Well, an attorney did come that you called; did he not? A. Yes, sir.

Q. And did you hold him out to Mr. Kowitt as being your attorney? A. I think I did, yes.

Q. And he was there for about a half hour; is that correct? A. To the best of my knowledge; I believe so.

Q. And before he came there, Mr. Kowitt was checking through your AB file, but he had not yet begun his audit; is that correct? A. To the best of my knowledge he was going through this AB file; right.

Q. Then this attorney arrived there. Do you recall saying something in words or substance to Mr. Kowitt after seeing his credentials that it was good or better than he was there than the police from the narcotic bureau or than the state police? A. I honestly don't recall.

Mr. O'Mara: That's all.

Mr. Castellino: I have nothing further.

The Court: Witness excused. Anything further on the motion to suppress the exhibits here?

Mr. Castellino: I have no further evidence.

The Court: Do you wish to make a statement on it?

Mr. Castellino: Yes, I do, Your Honor. There are two cases that I feel are very germane to the issue, which I wish at this time to call to the Court's attention to.

The Court: I might as well get the cases.

Mr. Castellino: 24 New York. Also, 14 New York, Your Honor. I don't know if you have the Supreme Court. That's 87 Supreme Court Reporter under the original reports. It's 387 U. S. The Court of Appeals case cited in 24 New York Second at 647 is the *Matter of Finn's Liquor Shop versus the State Liquor Authority.* The case in 14 New York Second is *People versus Laverne,* 14 New York Second, 304.

The Court: Yes, and now your Supreme Court case.

Mr. Castellino: See, *S-E-E, versus the City of Seattle,* 387 U. S. 544, City of Seattle. 875 of the Supreme Court Reporter at 1737.

The Court: All right.

Mr. Castellino: It's my contention, Your Honor, that under the decision and this decision is April of 1969, decided by the New York Court of Appeals, that a warrant was served even though made pursuant to statutory authority, as is apparently relied on here, is unconstitutional and in derogation of the defendant's constitutional rights as set forth in Article the fourth and fourteenth amendment of the U. S. Constitution and is violative of prohibition against unreasonable search and seizure.

Now, the Court of Appeals met this issue in the Finn case in which the State Liquor Authority was acting under Section 105, subdivision 15, of the Alcoholic Beverage Control Law which, in part, requires a licensee to keep adequate books and records of transactions and fur-

ther recites that such books and records shall be available for inspection by an authorized representative of the Liquor Authority.

Now, Judge Fuld, in writing the decision in this case at 654 stated: "It is no longer subject to question that State agencies charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with constitutional requirements and, more particularly, within the confines of the Fourth Amendment."

He went on to state at page 655: "The Authority, just as any other State agency, is obligated to conduct its activities in conformity with the demands of the Constitution." Now, this involved an inspection of the premises and seizure of certain records not only on the premises but upon personal clothing. But the prohibition and proscription as enunciated in this case, I submit to this Court, is clear.

The Court referred to *Mapp versus Ohio* decision as well as the two most recent decisions, one which I have cited in Court here; that's *See versus The City of Seattle* and the *Camara versus the Municipal Court*. The Court cited from the Plymouth case, and it states: "Under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."

Now, there was reference made in this case to the Sackler case in which illegally seized evidence was permitted in a proceeding. However, the Court distinguished that on the basis of private individuals were involved in the Sackler case as opposed to representatives of the government. And it stated that the Sackler case held that that decision would not be controlling where the evidence was illegally obtained.

Now, Judge Fuld, in referring to and commenting upon this statutory or attempted statutory grant of investigative power says: "What is even more significant is that such a broad grant of statutory authority to conduct warrantless searches would be unconstitutional," and I submit, of course, that this is what Articles 33 and 33(a) of the Public Health Law attempt to do as they attempt to place upon a state agency that authority to indiscriminately and arbitrarily conduct a search upon its own, while upon inspection without any intervention by a Court authorized to issue a warrant.

Now, this is what the Court had in mind, and this is what Judge Fuld clearly had in mind when he said: "No State may require as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified," and this is what we have here. Observation could be made that entry to the confines of the prescription area which have been testified to here are closed to the public, and they would attempt to justify this fishing expedition, and I think the testimony of Mr. Kowitt is clear on that. He didn't go there armed with any specific knowledge of violations. He went there to conduct an audit with respect to certain specified drugs. He was there solely for the purpose of gathering evidence, and this has been roundly condemned by the courts in numerous cases and, particularly, in *Kerr versus California* at 374 U. S. 23, which cites the proposition that search and seizure for the purpose of obtaining mere evidence in the forms of papers, books and records is unreasonable per se.

Now, that's pretty strong language, but this, of course, has been made applicable to the statements by virtue of the Fourteenth Amendment. But I think the language of the U. S. Supreme Court in *See versus Seattle* case

is even much stronger. And what the See case did was to make applicable a prohibition under the Fourth and Fourteenth Amendment to a commercial establishment. There has been no argument on the application to private dwelling houses, but in the See case the Court stated: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

Again, I submit that's what the narcotics division control bureau is attempting to do here. The Court and the U. S. Supreme Court stated: "We therefore conclude that administrative entry, without consent upon the portions of the commercial premises which are not open to the public, may only be compelled through prosecution of physical force within the framework of a warrant procedure."

Now, I submit to the Court that language is unequivocally clear. The courts have reached a point where they will no longer tolerate an administrative agency walking into a business place at any time of the day or night under any circumstances which they deem warrant such a search and going through a person's records.

Now, in the Finn Case, they were applying this rule of law to administrative hearing. They didn't even get to the situation of applying it in the criminal proceeding, but adamant in saying they would not permit that evidence to be introduced in an administrative proceeding let alone a criminal proceeding.

I think the conclusion is clear. The Court, in the See case, compared the administrative discretion to walk in and investigate books and records as comparable to subpoena powers; that just the arbitrary right to

issue a subpoena was long ago determined. The provision to enter and inspect will not be a product of unreviewed discretion of the officer in the field. Again, this is what we have here; unreviewed discretion of Mr. Kowitt or the unreviewed discretion of Investigator Capozzi.

The fact remains that subsequent to Mr. Terraciano's arrest, ample opportunity was afforded them to obtain a warrant here. This is not a situation where a circumstance is prevailed in which evidence might be destroyed. They waited from April 10th when Mr. Capozzi did not gain entrance until April 14th before bringing Mr. Kowitt in. Now, there was ample opportunity to obtain a search warrant here. They were not met with a situation whereby evidence might be destroyed. They had the opportunity within three days to obtain a search warrant.

Now, I submit that the courts have roundly condemned this practice, and the Public Health Law to the contrary, notwithstanding that there is no authority now existing in this state or this nation which permits this type of search and seizure which occurred here.

The question of consent obviously would rear its head in this case, and I think in respect to this it's interesting to note that in the affidavit submitted by the People of Theodore Kowitt under date of January 9th, nowhere do they state that Mr. Terraciano in any manner consented to this search.

Now, in our moving papers which we submitted to the Court on this motion, we contended that this search was not only without benefit of a warrant, but was without benefit of the consent and acquiescence of Mr. Terraciano. The People at no time attempted to refute this in their affidavit. We get no more than a scintilla of consent, perhaps, on reflection and second thoughts from Mr. Kowitt. Well, he didn't object, but yet we have the statement he was going to report this to his superiors insofar as his cooperation or lack of cooperation was concerned.

But the significant part of the affidavit of Mr. Kowitt, he made the search in accordance with the powers and duties conferred upon him by Article 33 and 33(a) of the Public Health Law. And further reference to his authority for making this search in accordance with the provisions of such law, in accordance with 8072 and 8180 of the Codes, Rules and Regulations of New York State.

Now, I've cited the Laverne case for this very point here, and while this involved a private dwelling, again the question of search was involved here. But the Court at page 307 in the Laverne case said: "The degree of resistance to this last described search is not certain in the record, but it is clear that there is no proof of consent and submission to the power of public authorities, and circumstances of this kind is not a consent."

And I submit that in view of what had befallen Mr. Terraciano being arrested only three days previously, because he asked Mr. Capozzi for an opportunity to call his attorney and relying on what he interpreted the law to be, that these people have an absolute right to walk in there at any time of the day or night; that he was forced to consent; that I submit to the Court that consent has not been established here. If the People wish to establish consent, this onus is upon them. Consent is not an exception to lawful search and seizure, but it has been engrafted upon the search and seizure only upon a strong showing that the People have sustained their burden of proof.

But we have here a situation where they were conducting an exploratory investigation. They were seeking evidence here as opposed to fruits and instrumentalities of the crime that such search is for no purpose. Of course, they are condemned and prohibited. But I stand on the declaration as are enunciated in the matter of Finn's Liquor Store, and I submit this is the law in this State, and this is the law of the nation and that a man, whether he is in the liquor business or whether in the

pharmacy business, is entitled to the equal protection of the law.

And if you are going to apply under the State Liquor Authority Act and the Alcoholic Beverage Control Law then Finn must have its application to the Public Health Law. They make no distinction here. We are talking about an administrative agency. There isn't a scintilla of probable cause here.

Now, the question of probable cause, as the Court knows, is varied and many, and I'm not going to get into that. Now, there is one case in the Third Department which involved an investigation by a member of the narcotic control commission and involved a warrantless search. Now, this was a *matter of Makawa, M-a-k-a-w-a, versus the Board of Regents*, 30 Appellate Division, Second, 459.

Now, they raise the question of warrantless search on appeal, but the Appellate Division—this, incidentally did not involve a criminal proceeding, but it involved an administrative hearing on a pharmacy license—but the Court of Appeals in passing upon the questions of search without a warrant—and, incidentally, Makawa was prior to the Finn case—but the Court, the Appellate Division even at this point said that no objection was made as to the constitutionality or the legal issue of admissibility and, therefore, the question was not preserved. But even at that point, they took cognizance of it since it had been raised on appeal but did not discount it.

Although they would not consider it, because it had not been preserved on appeal, but Makawa was prior to the Finn's Liquor. But before it, one could only speculate; but because it was not preserved, the Appellate Division did not pass upon it.

I submit and feel very strongly that situation here falls directly within the Finn prohibition and falls within the See case under the U. S. Court rulings, and that on the basis of this decision of law, that the evidence which

was obtained as a result of the search and seizure should be suppressed.

The Court: You're talking about exhibits one and two?

Mr. Castellino: I'm talking about those exhibits which would be introduced before the jury.

The Court: This is all I've got before me right now.

Mr. Castellino: Well—

Mr. Crew: No. His motion, Your Honor—I beg to differ with the Court respectfully—his motion, I concur with Mr. Castellino, is directed as to any and all evidence taken from the defendant, and we stipulated in the prior hearing that we did not use or intend to use anything taken from the home at which point Mr. Castellino directed his motion to all those items taken from the store of any kind during the course of this investigation which was or could have been used before the Grand Jury and which may be used on the trial.

The Court: Now, are those what are covered in People's exhibit—

Mr. Crew: People's exhibit one as set forth, all that evidence taken from the store.

The Court: That's what I want to know.

Mr. Castellino: We are seeking a return of all these items and seeking suppression of those items which are part of the criminal proceeding and are contained in the indictment.

Now, the defendant, or excuse me. Mr. Kowitt testified that he identified some 12 exhibits in Grand Jury, and I submit to the Court that many of those exhibits are the basis of counts contained in the indictment.

Now, we don't have a specific alignment, although the District Attorney's office furnished a bill of particulars relative to this in which they stated that, and paragraph six of their bill of particulars, that, "Upon information and belief prescriptions were proffered and received by the defendant at the time of the alleged transactions referred to in counts numbered 'Ninth' through 'Seven-

teenth' of indictment number 69-59 and that said prescriptions are alleged to be prescriptions of duly licensed physicians." But we are seeking the suppression of any items of evidence which are germane to this prosecution and which were introduced before the Grand Jury on which the indictment and counts therein are premised.

The Court: That's what I wanted to clarify. Thank you. I had not gone back over those papers. I just wanted to make sure.

Mr. Castellino: I want this record to make my position clear on that, too.

The Court: Yes.

Mr. Crew: Well, if it please the Court, I would like the balance of the week to submit a written memorandum in opposition to Mr. Castellino's statement. In point of fact, I anticipate I could do that within 48 hours. Particularly in the Finn case, as to the consent, I think there is ample evidence of consent already. This is not at all like the Finn case with that regard. We have had an attorney present here. It's clear the defendant himself on the stand has testified that he called this attorney. The attorney was present. His attorney was purportedly representing him. He was there at least a half hour.

There is no evidence whatsoever, and I submit there can't be, because it didn't happen that the attorney refused to allow it. He knew what this man was and what he was there for. There is no evidence whatsoever, even after the advent of the attorney on the premises that there was a denial to the inspection and subsequent taking.

It's quite obvious that the defendant was cognizant of his rights just in the fact that he called the attorney and he was there.

But I would like to submit a memorandum.

Mr. Castellino: The only thing I want to say, this man had refused consent to Investigator Capozzi and

it resulted in his arrest. Certainly we are dealing with an entirely different situation where an element of duress and constraint and was manifest as the result of Capozzi's appearance; how his appearance on the scene three days after the arrest certainly influenced his decision as evidenced by the testimony.

The Court: Then you went until Friday to get a memorandum.

Mr. Crew: In opposition to Mr. Castellino.

The Court: You want a chance to review the memorandum, I assume.

Mr. Castellino: Yes, I would, Your Honor.

The Court: Okay. That ends the case right now.

Certificate

I, George F. Barringer, County Court reporter, certify that the foregoing is a true and correct transcript of the proceedings held at the Chemung County Courthouse, Elmira, New York, on February 17, 1970, in the matter of People against Salvatore Terraciano.

Dated: ————————

GEORGE F. BARRINGER